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In The

Supreme Court of the United States

TUAN ANH NGUYEN AND
JOSEPH ALFRED BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ARGUMENT

A. Section 1409's Sex-based Classifications Must Be Struck Down Absent An "Exceedingly Persuasive" Justification For Such Classifications Under Current Constitutional Standards

1. The Sex-based Classifications In § 1409 And Its Precursors Reflect Deep-seated Stereotypes About Men's And Women's Parenting Roles

Beginning with its revision of the Question Presented, Resp't Br. I, Respondent attempts to obscure the fundamental issue before this Court, i.e., whether the differential treatment of mothers and fathers under 8 U.S.C. § 1409 constitutes sex discrimination violating the equal protection component of the Due Process Clause of the Fifth Amendment.[1] Contrary to the Government's formulation, this is not simply a case requiring evaluation of "certain conditions" placed on fathers. *Id.* Rather, § 1409(a) places greater burdens on unwed fathers than on unwed mothers who seek citizenship for their foreign-born, non-marital children. This classification differentiates between parents on the basis of their sex, and creates a formal, government-sponsored barrier impeding fathers from transmitting citizenship. It reinforces stereotypes based on the antiquated rule that women alone have responsibility for non-marital children.[2]

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[1] The Government also unilaterally revises Petitioners' claims by adding a challenge to the physical presence requirements of §§ 1401(g) and 1409(c), brushing aside the challenge to § 1409(a)(3), and labeling Petitioners' facial challenge as an "as applied" challenge. Resp't Br. 31-32. The Court should reject these attempts to reshape the claims and the Question Presented here.

[2] Because Petitioners do not raise an equal protection challenge based on differential treatment of married and unmarried parents, that issue is not before the Court. Accordingly, the Government's assertion that differences based on illegitimacy are "undisputed," Resp't Br. 47, is a mischaracterization. It is true, however, that the remedy sought here –

The Government itself has previously recognized the sex discrimination in § 1409. In 1982, the United States Attorney General reported on federal statutes that "needlessly provid[e] for unequitable treatment of the sexes," identifying § 1409 as a "sex-based statute[] requiring corrective action by Congress." The First Quarterly Report of the Attorney General to the President and the Cabinet Council on Legal Policy as Required by Executive Order 12336, app. B *in* 128 Cong. Rec. 19802, 19809 (1982). Indeed, in its brief in *United States v. Virginia*, 518 U.S. 515 (1996) [hereinafter *VMI*], the United States argued that "formal sex-based barriers, and the stereotypes that support them have no place in our modern Constitution." Brief for the Cross-Respondent at 9, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-2107). According to the Government, the Virginia Military Institute's men-only admissions policy – reflecting prevailing social norms when it was adopted in 1839 – "[is] patently illegitimate today." *Id.* at 19. This Court agreed, concluding that the Nation's "long and unfortunate history of sex discrimination" does not justify more discrimination now and in the future, but supports "skeptical scrutiny of official action denying rights or opportunities based on sex." *VMI*, 518 U.S. at 531 (citations omitted).

Here, however, the Government urges the Court to embrace the sex-based categories of § 1409 based on 19th century stereotypes. *See* Kristen Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure Of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1682-92 (2000) (explaining how *coverature* rules were reflected in text, implementation and interpretation of citizenship laws); *Miller v. Albright*, 523 U.S. 420, 460-65 (1998) (Ginsburg, J., dissenting) (detailing history of sex discrimination in

equal treatment of unwed mothers and fathers seeking to establish their children's citizenship at birth – will not disturb Congress's ability to distinguish between married and unmarried parents for purposes of citizenship insofar as permitted under existing law.

citizenship laws). Contrary to the Government's assertions that Congress set out to equalize the legal status of married and unmarried fathers by adopting § 405 of the Nationality Act of 1940, Congress simply codified the State Department's existing practice of deeming non-legitimated children of citizen mothers and legitimated children of citizen fathers to be citizens at birth. *See House Committee on Immigration and Naturalization, A Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments*, 76th Cong., 1st Sess., 17-18 (Comm. Print 1939) (explaining that proposed statutory section for non-marital children reflected State Department practice); *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the Comm. on Immigration and Naturalization*, 76th Cong. 62 (1945 reprint) (Statement of R.W. Flournoy, Assistant to the Legal Adviser, State Department) (same). This scheme privileged a father's ability to transmit his citizenship over a mother's because the moment a father legitimated the child, the mother lost her ability to transmit her citizenship. *See* Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1139-40. Further, this scheme assured that mothers retained all of the "burdens" of parenthood for non-marital children. *See, e.g., Relating to the Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 72nd Cong. 3-7 (1932) (Statement of Chairman, House Comm.) (noting that "[i]n the present law the burden is carried by the mother of an illegitimate child").[3]

[3] The INA incorporated this scheme regarding citizenship for non-marital children. *See* Immigration and Nationality Act, ch. 477 § 309, 66 Stat. 163, 238-39 (1952). Similarly, in 1986 Congress adjusted the provision for fathers but retained the law's sex-based classifications. *Administration of*

This Court has long since rejected the patriarchal notions of family on which these classifications rest. *See Planned Parenthood of Southeastern Pa. et al v. Casey* 505 U.S. 897 (1992) (rejecting "common-law understanding of a woman's role within the family"). As sex-based classifications, the challenged provisions of § 1409 cannot survive heightened scrutiny absent an "exceedingly persuasive justification." *VMI*, 518 U.S. at 533. Aside from generalized assertions regarding men's and women's parenting capacities, the Government offers three additional rationales for the sex-based categories of § 1409. The first — to ensure that non-marital children born abroad develop a close connection to their citizen parent and thus to the United States during their minority — has been thoroughly discussed in prior submissions. In brief, this purported goal is a post hoc rationale that, even if accepted at face value, does not justify discrimination based on sex. [4] Pet. Br. 16-21. The second justification offered by the Government for the sex-based classifications of § 1409 is the claim that a father must take affirmative steps to establish a legal relationship to his child. Resp't Br. 32. Finally, the Government argues that the sex-based classifications are needed to avoid statelessness. *Id.* at 42-44. As set out below, the latter two rationales do not provide the "exceedingly persuasive justification" required to sustain such sex-based classifications.

2. Concerns Over Fathers' Legal Relationships to Their Children Do Not Justify the Sex Discrimination of § 1409

the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees and Int'l Law, 99th Cong. 22 (1986).

[4] The legislative history of § 1409 nowhere mentions promotion of "close family ties" as a motivating factor in the adoption of § 1409. National Women's Law Center *Amicus* Br. 23-25 [hereinafter NWLC Br.].

According to the Government, the sex discrimination of § 1409 is justified because the statute assures that an unwed citizen father has the same "recognized and formal relationship" as a citizen mother. Resp't Br. 33-34. But the Government never explains exactly what this "recognized and formal relationship" is, or why a mother need not show anything other than "the fact of maternity" to transmit citizenship while a father must show much more than the fact of his paternity.

Even if the "legal relationship" between parent and child were pertinent to citizenship, the Government is simply wrong that unmarried fathers have no legal relationship to their children. State laws regarding out-of-wedlock fathers' parental status have changed dramatically in the past six decades. The decided trend has been to recognize the importance of fathers' responsibilities to their non-marital children, and to develop laws that ensure that children receive the benefits of parentage from their fathers rather than leaving it up to the father to take affirmative actions to establish his legal responsibility. Given these new developments, the state of the law in 1940 or even 1986 is irrelevant to the constitutional question before this Court. As this Court has repeatedly held, the constitutionality of a law challenged under the Equal Protection Clause is evaluated in light of conditions pertaining at the time of the challenge. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 465 (1988) (taking current statutory and technological developments into account in evaluating government interest); *J.E.B v. Alabama, ex.rel T.B.*, 511 U.S. 127, 142 (1994) (rejecting governmental interest based on historical stereotypes).

This trend towards putting all non-marital children on equal footing, regardless of the sex of their parent, is most marked in the areas of law where, as here, children are the ultimate beneficiaries (or potential losers) under a system that ties their fates to fathers' unilateral actions, i.e., child support and inheritance. Thus, all states have child support

enforcement systems in place where the key factor triggering parental responsibility is paternity or maternity establishment, not legitimation, and all have abandoned gender-based common law principles governing child support. *See* NWLC Br. 19, 25-27.

Likewise, following the same rationale, many states have abandoned sex-based classifications in the analogous area of inheritance. Nine states make no gender-based distinctions in intestate succession statutes governing inheritance rights of children born out of wedlock.[5] Importantly, all states, even those that retain some sex-specific provisions, take an approach that, unlike § 1409(a), shields non-marital children from the exigencies of parental behavior. Like child support, the key is paternity establishment - once paternity is established, with or without the father's voluntary participation, a child may inherit from his unwed father.[6] Moreover, many states impose no time limit on paternity establishment for the purposes of inheritance.[7] As with

[5] *See, e.g.*, Ariz. Rev. Stat. § 14-2114, §25-806 (LEXIS, through 2000); Colo. Rev. Stat. § 15-11-114 (LEXIS, through 1999); Kan. Stat. Ann. §59-501, § 38-1113 (LEXIS, through 1999 Sess.); Minn. Stat. Ann. § 524.2-114, § 257.54 (LEXIS, through 1999 Sess.); N.M. Stat. Ann., § 45-2-114 (LEXIS, through 1999 Supp.); Mont. Code Ann. § 72-2-124, § 40-6-104 (LEXIS, through Oct. Sess. 1999); N.D. Cent. Code § 30.1-04-09, § 14-17-03 (LEXIS, through 1999 Reg. Sess.); R.I. Gen. Laws §33-1-8 (LEXIS, through 1999 Sess.); Wash. Rev. Code Ann. § 11.04.08, § 26.26.030 (LEXIS, through ch. 1, Reg. Sess. 2000).

[6] *See* statutes *cited in* notes 5 *infra*, 7 *supra*. *See also* Jesse Dukeminer & Stanley M. Johanson, *Wills, Trusts & Estates* 106-7 (5th ed. 1995).

[7] *See, e.g.*, N.J. Stat. Ann. § 3B:5-10 (LEXIS, through P.A. 1999, ch. 306) (providing that parentage act time limit of five years post-majority to establish parent-child relationship does not apply to inheritance). Other states provide that one way a child may inherit from an unwed father is by establishing paternity after death by clear and convincing evidence. Ala. Code § 43-8-48 (LEXIS, through 1999); Ga. Code Ann. § 53-2-3 (LEXIS, through 1999); Idaho Code § 15-2-109 (LEXIS, through 1999); Me. Rev. Stat. tit. 18-A § 2-109 (LEXIS, through 1999 Supp.); Mo. Rev. Stat. § 474.060 (LEXIS, through 1999); Neb. Rev. Stat. § 30-2309 (LEXIS, through 2000); N.H. Rev. State Ann. § 561:4 (LEXIS, through 1999 Sess.); Pa. Cons. Stat. § 2107 (LEXIS, through 1999); Tenn. Code Ann. § 31-2-105 (1999); Del. Code Ann. tit. 12, § 508 (LEXIS, through 1999) (using preponderance of evidence standard for same).

citizenship, there is no reason to put an expiration date on a parent's ability to transmit, and a child's ability to receive, the benefit of an inheritance.

The notion that Congress must take state law—especially discriminatory state law—into account in drafting its federal citizenship law simply has no precedent. On the contrary, this "one discrimination justifies another" approach has been rejected by courts and commentators. *See, e.g., Orr v. Orr*, 440 U.S. 268, 280 n. 9 (1979) (argument that common law discrimination justifies sex-based classifications "reveals its own weakness"); *Parham v. Hughes*, 441 U.S. 347, 361 n. 2 (1979) (White, J., dissenting) ("It is anomalous, at least, to assert that sex discrimination in one statute is constitutionally invisible because it is tied to sex discrimination in another statute, without subjecting either of these classifications on the basis of sex to an appropriate level of scrutiny."); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 207 (1998) (noting, in analyzing *Hirabayashi v. United States*, 320 U.S. 81 (1943), that "[t]here is considerable irony, of course, in relying on previously existing [race-based] laws discriminating against Japanese immigrants to conclude that still further disabilities should be imposed upon them . . ."). Thus, discriminatory state laws provide no safe harbor for the Government in defending its own sex-based classifications under § 1409(a).

3. Concerns Over Statelessness and Dual Citizenship Do Not Justify the Gender Discrimination in § 1409

The Government's attempt to excuse the sex-based classifications of § 1409 by reference to sex-based foreign laws fares no better. As a threshold matter, the Government

concedes that Congress's concerns regarding statelessness provide an underpinning only for the less stringent physical presence requirement for non-marital mothers of § 1409(c). Resp't Br. 18-19, 42, 44 n. 23. It cannot be overemphasized, given the Government's erroneous attention to this issue, that the physical presence requirements of §§ 1409(c) and 1401(g) are not challenged in this case. Because Joseph Boulais meets the physical presence requirements of both provisions, he can demonstrate no harm as a result of the requirement and therefore has no standing to challenge it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, the Question Presented refers to § 1409(a) and does not cite the physical presence requirement of § 1401(g). Likewise, the court below concluded that the challenge here was limited to §§ 1409(a)(3) and (4). Pet. App. 12a n. 8.[8] For similar reasons, a majority of this Court in *Miller* also acknowledged that the physical presence requirement of § 1401(g) was not at issue in that case. *Miller*, 523 U.S. at 430; *id.* at 472 (Breyer, J. dissenting). The Government's relentless focus on statelessness is a diversion.

In any event, if statelessness were the true concern, § 1409 is grossly overinclusive, because children born abroad to citizen mothers in countries with *jus soli* laws are not stateless, but gain the advantage of the shortened physical presence requirements. It is also grossly underinclusive because a child born abroad to a citizen father in a *jus sanguinis* country where citizenship passes only through fathers would be stateless but subject to the longer residency requirement.[9] There is no rational justification — much less an "exceedingly persuasive" one — for subjecting all fathers, but no mothers, to extended physical presence requirements based on the possibility that some children might be stateless if not granted citizenship through their mothers.

Congress could most effectively address the potential for statelessness not through a sex-based distinction, but through a gender-neutral rule either providing generous physical presence requirements regardless of sex or narrowly trained on statelessness. The Government itself entertains the former possibility, then rejects it simply by reasserting the stereotype on which the current law is based: that fathers will not have the same tie to their children as mothers. Resp't Br. 43. *Cf. J.E.B.*, 511 U.S. at 138 (refusing to accept "very stereotype law condemns" as defense to gender based classification). Similarly, the Government speculates that a more narrow, tailored rule applying relaxed physical presence requirements on a case-by-case basis would both discourage legitimation by foreign fathers and create administrative burdens. Resp't Br. 42-43. As to legitimation, the Government's unsupported assertion is pure hypothesis. *Cf. VMI*, 518 U.S. at 533. Likewise, the administrative problems that the Government postulates provide no convincing rationale for undermining the integrity of the citizenship laws by permitting sex discrimination. *See Califano v. Goldfarb*, 430 U.S. 199, 217 (1976); *Craig v. Boren*, 429 U.S. 190, 198 (1976).

Finally, the Government raises the issue of dual citizenship. Congress, however, has never cited this "problem" as a basis for the gender distinction at issue in

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[8] The Government ignores the Court of Appeals decision and asserts that § 1409(a)(3) is not at issue here because Nguyen was over 18 when he asserted his citizenship. Resp't Br. 9, 32. This same reasoning, however, would also bar a challenge to § 1409(a)(4), leading to the absurd result that no one whose rights were cut off by the 18-year bar would ever be able to challenge it. The Government also asserts that (a)(3) does not apply because Petitioners might have elected to proceed under the old law in order to avoid the support requirement (despite its more onerous legitimation and physical presence rules). *Id.* at 32. Even under the old law, Petitioners would still be subject to sex-based requirements violating their equal protection rights.

[9] For example, according to the State Department, in Egypt, "only males may confer citizenship." U.S. Department of State, 1999 Country Reports on Human Rights Practices: Egypt (2000), http://www.state.gov/www/global/human_rights/1999_hrp_report/egypt.html.

this case. Indeed, dual citizenship is permitted unless there is intent to renounce United States citizenship. *Vance v. Terrazas*, 444 U.S. 252, 270 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967). The Government does not explain why dual citizenship would be a greater problem when a child born abroad has a citizen father than a citizen mother. That there might be a small number of additional children with dual citizenship if it were easier for children of citizen fathers to become citizens does not provide an "exceedingly persuasive justification" for a sex-based citizenship law.

4. Invalidation of § 1409 Would Not Lead To A Flood of Litigation Over Unrelated Statutes

Because of changes in state laws noted above – and the specific rationale behind the changes -- the Government's assertion that a ruling for Petitioners would create a "flood of litigation" is disingenuous. First, recognizing that non-marital mothers and fathers should be on equal footing in terms of transmitting citizenship at birth to their children would confirm an existing trend already apparent in state laws such as child support and inheritance where children are the ultimate beneficiaries. Because this case involves a benefit transmitted from father to child, it is readily distinguishable from examples such as adoption, child custody and domicile recited by the Government in support of its "slippery slope" argument.[10]

Similarly this case is distinguishable on this basis from *Parham v. Hughes*, 441 U.S. 347 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983). In *Parham*, the father initiated a wrongful death action on behalf of his non-marital son. In upholding the law requiring legitimation as a prerequisite to

[10] Notably, while the common law of domicile establishes a default rule that reinforces mothers' responsibility for non-marital children, that presumption is overridden if the father is the sole caretaking parent. *See* Restatement (Second) of Conflicts of Laws, § 22 cmts. c, e (1971) (noting that if child is abandoned by mother, child takes domicile of father).

filing suit, the Court specifically noted that any burden arising from the father's inability to sue would fall exclusively on the father. 441 U.S. at 360 (Powell, J., concurring) (noting that bar to father's suit is a "disability that only he will suffer"). Likewise in *Lehr*, an unmarried father claimed an absolute right to notice and an opportunity to be heard before his child was adopted, despite his minimal involvement in his child's life. 463 U.S. at 250-252. As with *Parham*, the Court focused on the fact that a father sought to obtain benefits (the right to participate in adoption) that would inure only to the father since his involvement was not deemed to be in the child's best interest. *See Lehr*, 463 U.S. at 258, 264 n. 22. *See also Quilloin v. Walcott*, 434 U.S. 246, 254 (1978) (permitting adoption over objections of non-marital father served "best interests of the child").

Here, in contrast, the benefits or burdens of the father's inaction fall heavily on the child. While the father may accrue some benefit from uniting his family, citizenship, like inheritance or child support, is a tangible benefit to the child that is portable and that endures beyond the life of the parent. The child is the clear loser when the statutory scheme excuses a father from sharing such benefits with his child. When the scheme, as here, excuses fathers alone, and ensures that virtually all similarly situated children of unwed mothers can claim the benefit, the inequality is particularly clear. This is the motivating principle behind efforts to eliminate sex-based classifications from state laws of child support and inheritance, and it also serves as a basis for distinguishing this case from those where the benefits at issue inure exclusively or primarily to the father.[11]

[11] In addition, this case is distinguishable on its facts from *Lehr*, where the father had little relationship with the child. 463 U.S. at 252. Like the father in *Caban v. Mohammed*, 441 U.S. 380 (1979), Boulais has maintained a close relationship with his son since his infancy. *Id.* at. 393. As this Court noted in *Lehr*, "these statutes may not constitutionally be applied in

The Government's "floodgates" argument is also misguided because the concerns addressed by state law are vastly different than citizenship. State laws in the areas of adoption, inheritance, child custody, child support and wrongful death recovery must all address the problems that arise when competing claims vie for limited resources. *See Lehr*, 463 U.S. at 266 (adoption must "promote the best interests of the child, . . . protect the rights of interested third parties, and . . . ensure promptness and finality"). This circumstance requires a different approach than citizenship, and it may justify efforts by the state to create a hierarchy of claims. In contrast, there are no competing claims – and no limited resources to be apportioned – in the area of citizenship. *See also* Pet. Br. 35-36 (distinguishing *Lehr*).

B. Congress's Plenary Power Over Immigration Is Not So Broad As To Shield From Review A Statute Involving Citizenship at Birth

The Government asserts that Congress's plenary power over immigration is sufficiently broad to shield the sex-based classifications in § 1409 from "skeptical scrutiny." However, while touting the extreme deference due to Congress in the execution of its role under the Naturalization Clause of the Constitution, the Government overlooks the plain consequences of the manner in which Congress has executed this authority. As set out in Petitioners' initial brief, the Immigration & Nationality Act could not be more clear: under § 1409, once citizenship is recognized it begins "as of the date of birth." 8 U.S.C. § 1409(a). As recognized by a majority of this Court in *Miller*, this stands in sharp contrast to Congress's treatment of naturalization, which specifically provides that citizenship

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that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Lehr*, 463 U.S. at 267.

when acquired is prospective only. *Miller*, 523 U.S. at 432; *id.* at 480 (Breyer, J., dissenting); 8 U.S.C. § 1101(a)(23).

Congress's choice to accord citizenship "at birth" to certain children of citizens born outside the United States means that citizens alone – the citizen parent and the putative citizen child – are direct beneficiaries of the statute. Because citizenship at birth under § 1409 is indisputably not a constitutional right but a statutory one, Congress could change these laws to deny such citizenship under the circumstances presented here. But as written, the import of the law is clear. It would be a dramatic expansion of Congressional plenary power to deny full constitutional review to citizens or putative citizens asserting their equal protection rights under laws of which they are the sole direct beneficiaries. Further, such an expansion is not justified by the plenary power doctrine's foreign relations purpose. Pet. Br. 29; *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

Significantly, this is exactly the proposition that the Government itself advanced in *Rogers v. Bellei*, 401 U.S. 815 (1971). While the Respondents now cite *Rogers* for the proposition that the plenary power doctrine shields citizenship at birth statutes from heightened scrutiny, that argument was not made in *Rogers*. Instead, the Government treated the respondent as a citizen and specifically conceded that "due process mandates . . . would bar any arbitrary, unreasonable, **or discriminatory conditions**" on citizenship at birth status. Brief for Appellant at 21, Rogers v. Bellei, 401 U.S. 815 (1971) (No. 24) (emphasis added). The Government nevertheless argued that only rational basis review was appropriate since no basis for heightened scrutiny was advanced. This Court agreed, applying rational basis review rather than either heightened scrutiny or the more deferential "facially legitimate and bona fide reason" test that would have signaled an invocation of Congress's plenary power authority. *Rogers*, 401 U.S. at 833 (applying

rational basis standard in reviewing claim of citizen at birth). Accordingly, *Rogers* supports the proposition that statutory conditions on citizenship at birth must comport with ordinary constitutional standards.

While *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), also involved citizens' claims of constitutional violations, neither involved citizenship at birth and both are distinguishable from the narrow proposition advanced here. *Kleindeinst* involved first amendment claims made by citizens who were not the direct beneficiaries of the statute at issue; the direct beneficiaries of the statute were non-immigrant visitors to the United States. *Fiallo*, in contrast, did involve some citizens directly as sponsors, but the benefit being sought in each instance was a special immigration preference – not citizenship at birth – for non-citizens, whose new immigration status would be prospective only. Thus, the deferential review exercised in both of these cases does not call into question the availability of heightened scrutiny here.[12]

Further, even if the citizenship-at-birth statute was deemed to be within the general scope of Congress's plenary authority over immigration, the plenary power that Congress enjoys is far from impermeable. Even in those

[12] Notably, this Court's jurisprudence has changed substantially since *Fiallo* was decided in 1977. The "pathmarking decisions" on sex discrimination cited in *VMI* - including *J.E.B. v. Alabama ex rel. T.B.*, *Mississippi Univ. for Women v. Hogan* and *VMI* itself – all post-date *Fiallo*. *VMI*, 518 U.S. at 531 (citations omitted). These significant developments necessarily cast a shadow on *Fiallo*'s continued persuasive value. In any event, the sex-based classifications of § 1409 would also fail under either rational basis review or the more deferential review under plenary power. This is particularly true because the benefit that § 1409 denies to fathers and their non-marital children based on impermissible and invidious sex stereotypes is a core political right – the ability to transmit and acquire citizenship without discrimination. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996).

areas where Congress's power is in full force, this Court has never wholly abdicated review and indeed, in many instances, has provided ordinary constitutional review. *Fiallo* itself accepted "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens," albeit limited responsibility. *Fiallo*, 430 U.S. at 793 n.5. Five years later, in *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), the Court put to rest any idea that the Due Process Clause is necessarily inapplicable to aliens. *See Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). This approach is entirely appropriate given the extraordinary nature of the plenary power doctrine, which effectively eliminates the checks and balances so necessary to the full realization of our system of government.

In contrast to this Court's measured approach, the Government's broad formulation of the plenary power doctrine would seem to shield everything from review that arguably touches on foreign relations. Petitioners' claim, however, is far more modest than the Government's characterization. It rests on the history and tradition of *jus sanguinis* citizenship, the plain language of the Immigration & Nationality Act that codifies the status of citizen at birth, and the uncontroversial proposition, accepted by the Government in its brief in *Rogers*, that the integrity of laws requires that citizens' equal protection rights be enforced. Upholding this proposition would do no damage to the immigration and naturalization plenary power that the Government seeks to protect.

C. The Modest Remedy Sought By Petitioners Effectuates Congress's Intent And Is Fully Consistent With This Court's Remedial Authority

The Government concedes that "[t]he judiciary has an unquestioned role in protecting rights accorded under the Constitution to citizens," Resp't Br. 23, but argues that a

ruling here would extend beyond the Court's proper role. As explained above, Congress has already, through the provisions of the Immigration & Nationality Act, exercised its choices about membership in the polity; this Court is called on simply to exercise judicial review consistent with those choices.

In their opening brief, Petitioners proposed a straightforward remedy to address the specific claims that §§ 1409(a)(3) and (a)(4) violate their rights under the equal protection clause. Yet ignoring the remedy actually sought by Petitioners, the Government presents a parade of unworkable "horribles" to argue that there can be no remedy. Since the Government only passingly addresses the remedy advanced by Petitioners, i.e., severance of §§ 1409(a)(3) and (a)(4), it must be presumed that the Government could find no dramatic flaw with that approach.

The Government, however, claims that severance is improper. The irrelevance of *INS v. Pangilinan*, 486 U.S. 875 (1988), is addressed at Pet. Br. 37-38. Indeed, the Government no longer seems to place much stock in the case, which bars a judicial grant of citizenship as an equitable remedy, but says nothing about the equitable remedy of severance at issue here.

Laying *Pangilinan* aside, the Government misstates the law regarding severance, which provides that when a statute contains a severability clause, the party seeking to avoid severance bears a heavy burden of showing that the clause should be ignored. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Here, the Government falls far short of producing "strong evidence" that Congress would not have extended citizenship-at-birth benefits to children of non-marital mothers and fathers equally had it known that the sex-based classifications of § 1409(a) were unconstitutional. *Alaska Airlines*, 480 U.S. at 686. In fact, the legislative history suggests the opposite conclusion. The INA's severability

clause, dating from 1952, was specifically reconsidered by Congress after this Court exercised the clause in *INS v. Chadha*, 462 U.S. 919 (1983). By retaining the clause following hearings on the matter in 1983, Congress effectively reaffirmed its intention that the clause be used to its fullest extent. *See generally The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Admin. Law and Gov't Rel. of the House Comm. on the Judiciary*, 98th Cong. (1983) (reconsidering severability clause in INA). Certainly, by that date and in the wake of *Fiallo*, the possibility that a provision of the INA might be severed under the equal protection clause would have been within Congress's contemplation.

In considering severance, this Court also examines the history and context of the provision at issue. *See Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring) ("In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.") (citations omitted). Though the Government repeatedly suggests that abrogation is an alternative, Resp't Br. 47-48, even a casual investigation demonstrates the central history *jus sanguinis* citizenship has played in the law of citizenship since the early days of the republic. *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). Abrogation would traverse Congress's clear, longstanding intent to extend that benefit to citizens. Further, it would ignore the evidence in the federal child support laws that Congress is now prepared to recognize legal ties between children and non-marital fathers based on paternity establishment, rather than requiring additional affirmative acts by fathers.

By the Government's own lights, extension of § 1409(a) to mothers would have a greater disruptive effect on the

statutory scheme than severance. Despite its assertions that the requirements of (a)(3) and (a)(4) are minimal, the Government admits that imposing (a)(3) and (a)(4) on citizen mothers would heighten risks of statelessness that § 1409(c) sought to counter. Resp't Br. 49 n.25. Petitioners agree that expanding § 1409(a) to mothers is not the appropriate remedy here, in particular because it would (1) run counter to the INA's severability clause; (2) deny expected benefits to mothers; and (3) require greater judicial reworking of the existing statutory framework. The Government's assertion that severance of (a)(3) and (a)(4) would be equally disruptive, however, is misguided.

The Government initially claims that severance would undermine the statutory scheme by equating non-marital fathers with marital fathers. First, the fact that § 1409(c) currently provides more generous terms for non-marital mothers than marital parents of both sexes indicates that the purported goal of favoring marital spouses was not as overriding as the Government now contends. Second, as noted above, a decision striking §§ 1409(a)(3) and (a)(4) will not bar distinctions based on marital status; the means to make such distinctions are readily available to Congress should it wish to pursue that goal. Finally, § 1409(a)(1) requires that proof of the relationship between the non-marital child and father be established by "clear and convincing evidence." Section 1401(g) sets out no such specific standard for proof of parentage. Consistent with this statutory language and in accordance with this Court's decision in *Rivera v. Minich*, 483 U.S. 574, 575 (1987), marital fathers could be held only to the "preponderance of the evidence" standard in proving parentage for purposes of § 1401(g).

Respondents further argue that "striking 'burdens' imposed by § 1409(a) would confer citizenship . . . on thousands of foreign-born children who have no connection to this country other than a blood relationship to a citizen

father they have never known or even seen." Resp't Br. 48. This dramatic statement does not stand up to analysis. As set out in detail in Petitioners' opening brief, upon severance of (a)(3) and (a)(4), the requirements of physical presence, nationality, and proof of paternity by clear and convincing evidence will remain. Pet. Br. 35. For most "foreign-born children who have no connection to this country," proof of paternity will prove an insurmountable barrier. *See, e.g.*, Anne Keegan, *Children of Vietnam Find Few Fathers at U.S. Doors*, Chi. Trib., May 13, 1987; *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122-1123 (9th Cir. 1999) (noting that mother and son searched for out-of-wedlock father for over 20 years). Likewise, proof of physical presence through school and employment records will be difficult to obtain for someone who has had no contact with this country and "never known or even seen" their father. Resp't Br. 48. Far more typical will be a case similar to the one at bar, where the citizen father and his child have maintained contact and the father assists in assembling the requisite proof.

But even if, as the Government intimates, not all of the children of citizen fathers admitted under a revised § 1409 are "assets" to the country, there is no assurance that non-marital children of citizen mothers are any more desirable. Yet the current version of the law assumes that sex-based dichotomy. As a result, fathers like Joseph Boulais who have a close connection with their children are assumed to be less worthy. As in *Caban v. Mohammed*, "[t]he facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers." 441 U.S. at 394.

The measure of an equal protection violation is not the numbers of people affected, but the individual who experiences discrimination at the hands of the state. *See J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring) ("The Equal Protection Clause and our constitutional tradition are based

on the theory that an individual possesses rights that are protected against lawless action by the government."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial . . . [or] sexual . . . class.'") (citations omitted). Petitioners Joseph Boulais and his son demonstrate the individual impact of these sex-based classifications on fathers and their families – an impact that no mother will ever experience under the existing law. That Boulais may be in the minority of fathers who care for their children from infancy is beside the point. This Court has never required that remedies for equal protection violations must address the needs of the majority. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (admitting male nursing student to all-female school). To the contrary, the equal protection clause is intended to protect individuals like the father and son here.

CONCLUSION

For the foregoing reasons and those in the Brief of Petitioner, the Court should declare 8 U.S.C. §§ 1409(a)(3) and (a)(4) unconstitutional and reverse the judgment below.

Respectfully submitted,

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